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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

California's Reply Brief

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We file this brief under Rule 24.4, to respond to new matters raised in the opposing brief of the United States.

1. Inconsistency of the United States' Argument and the Lower Decisions.

In its opposing brief, the United States supports the decisions of the lower courts by arguing a theory that was not relied on by the courts, and that is actually inconsistent with the theory on which the courts relied. The lower courts held that section 8 of the Reclamation Act of 1902 requires the U. S. Bureau of Reclamation (the "Bureau") to comply with the "forms" but not the "substance" of state appropriation laws, and thus exempts the Bureau from *all* conditions resulting from the state laws. However, the United States, in its opposing brief, argues that the conditions imposed by

California in this case are invalid because they enable California "to assert control over the operation of the New Melones Project," and "conflict specifically with the congressionally approved plans and objectives of the New Melones Project." Brief for the United States in Opposition (hereinafter "U.S. Brief") 8, 9. Indeed, it would frame the issue as whether a state can impose "conditions that would give the State virtual control of the operation of the project." U.S. Brief 5. Thus, the United States appears to argue that the validity of state-imposed conditions depends on the nature of the conditions, in terms of whether they interfere with project operation or are inconsistent with congressionally-authorized project purposes. In short, the lower courts held that the conditions are invalid *per se,* without reference to their impact on project purposes or operation, and the United States argues that the conditions are invalid because of their impact on project purposes and operation. The United States, rather than relying on the novel theory of water law put forth by the lower courts, thus appears to accept our contention that the validity of the conditions depends on their nature and effect. Its argument convincingly shows the necessity for a review of the lower decisions by this Court.

Since the lower courts held that the conditions are invalid *per se*, they did not reach the question whether the conditions are inconsistent with project purposes or impair project operations. Indeed, as was noted below, the United States conceded at oral argument that it cannot now challenge the conditions on these grounds, since it failed to appeal from the administrative decision resulting in the issuance of the conditional permits. Pet. App. 9 n. 1. Hence, it would be inappropriate for the Court to deny our petition on grounds, as urged by the United States, that the conditions impair project purposes or operations.

We cannot fail to note that the United States has grossly misstated the nature and effect of the conditions in its opposing brief. The United States fails to mention that the major conditions involved in this case, conditions nos. 1 and 2, merely seek to defer impoundment of some project waters until the Bureau develops a plan for the use of the waters. Def. Ex. 2, pp. 14-15, 29-30. Thus, these conditions do not tell the Bureau how to operate the project, but merely require the Bureau to tell California what it intends to do with California's waters before storing them. Also, the United States fails to mention that the other, minor conditions, which are described at length in the United States' opposing brief, do no more than repeat specific provisions that are already found in the congressional act authorizing the New Melones Project, or repeat the terms of contracts that have already been signed by the Bureau and California agencies, or simply adopt the Bureau's own estimates of how much water it needs for selected project purposes.[1] Thus, the conditions do not impair project purposes, or interfere with project operations.

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1. For instance, the United States points out that condition no. 4 requires a preference to be given to water users in the four counties which comprise the water basin in which the New Melones Project is located, and that condition no. 25 similarly requires a preference to be given to these four "counties of origin." U.S. Brief 8, 9 n. 4. However, the United States fails to mention that these conditions merely echo a provision in the congressional act authorizing the New Melones Project, which requires a preference to be given to "all existing and anticipated future needs within that basin," 76 Stat. 1191 (1962), *i.e.* the basin in which the four counties are located.

The United States points out that condition no. 5 requires that storage releases be scheduled to maintain a particular concentration of total dissolved solids. U.S. Brief 8. However, the United States fails to mention that this condition merely repeats a contractual obligation which results from an agreement voluntarily entered into by the Bureau and a California agency. Def. Ex. 2, p. 11.

2. The Federal Reserved Rights Doctrine.

In our petition, we assumed that the United States would seek to sustain its position by arguing that, under the "implied reservation" doctrine, it has a federal reserved water right that is beyond the reach of California law, and that section 8 does not abrogate the federal reserved water right. Under the "implied reservation" doctrine, the United States has the right to use water, under the Commerce and Property Clauses of the U. S. Constitution, independently of state law. *Cappaert v. United States,* 426 U.S. 128, 138 (1976); *Arizona v. California,* 373 U.S. 546, 597-598 (1963); *United States v. District Court,* 401 U.S. 520, 522-523 (1971); *Winters v. United States,* 207 U.S. 564 (1908). However, in its opposing brief, the United States makes the remarkable concession that "the United States has not claimed any reserved rights in connection with the New Melones Project." U.S. Brief 11. If the United States thus lacks a reserved water right, it clearly must comply with state appropriation laws. That is, the United States obtains water

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The United States points out that condition no. 2 provides that the Bureau, in storing water for protection of fish and wildlife, can impound no more water than will result in the annual release of 98,000 acre-feet of water. U.S. Brief 8. However, the United States fails to mention that this figure was based on the Bureau's own estimates of the water it needs to impound in order to release water for protection of fish and wildlife. Def. Ex. 2, pp. 20-21.

The United States points out that condition no. 14 prohibits the Bureau from storing water during certain seasons of the year. U.S. Brief 8. However, the United States fails to mention that this limitation was inserted because unappropriated water was not available during those selected seasons. Def. Ex. 2, pp. 10, 34. The lower courts implicitly upheld this condition, since they concluded that the State Board has jurisdiction to determine the availability of unappropriated water.

The remaining conditions described by the United States merely involve mundane matters, such as the submission of reports by the Bureau to the State Board, that have no effect on project purposes or operation.

rights independently of state law under the "implied reservation" doctrine, which in turn rests on the United States' constitutional authority to regulate commerce and control federal lands; if the United States lacks a reserved water right, it has no constitutional authority to acquire its water rights independently of state law, and instead acquires its water rights in the same manner as private appropriators. This Court has held that private appropriators are fully subject to state appropriation laws. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935). Hence, the United States, by its concession, has abandoned the sole legal theory which this Court has used in past cases to exempt federal water rights from state laws, and has thus abandoned the sole legal theory that might sustain the judgment below. Its concession might thus well merit a summary reversal of the lower judgment.

3. The Nebraska, Ivanhoe and Arizona Decisions.

In its opposing brief, the United States fails to make reference to the decision in *Nebraska v. Wyoming,* 295 U.S. 40, 42 (1935), where this Court clearly held that, under section 8, the Bureau's authority to "impound and release waters . . . are subject to the authority of Wyoming," and that the Bureau "must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator. . . ." Instead, the United States supports its position by reference to this Court's decisions in *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), and *Arizona v. California,* 373 U.S. 546 (1963). As noted in our petition, the Court in *Ivanhoe* held that the states cannot interfere with "specific and mandatory" congressional laws and policies, such as the acreage limita-

tion set forth in section 5 of the Reclamation Act of 1902. Pet. 16-17. Similarly, it was held in *Arizona* that the states cannot interfere with the specific authority of the Secretary of the Interior to enter into contracts with water users under section 5 of the Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (1970), which governs the Colorado River. 373 U.S. at 587-588. Thus, those decisions support our view that the validity of state-imposed conditions depends on whether they are inconsistent with specific, mandatory reclamation laws or policies established by Congress.

However, the United States relies on *dicta* in *Ivanhoe* and *Arizona,* where the Court stated that section 8 "requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights . . .," and cannot be construed to require "the United States to deliver water on conditions imposed by the State." 357 U.S. at 291-292. However, this *dicta* supports the position of California, not the United States. The primary state-imposed conditions in this case, which defer impoundment of some project waters until the Bureau develops a plan for their use, involve the Bureau's efforts "to acquire water rights," not its efforts "to deliver water . . . ." Accordingly, the lower courts did not rest their decisions, even in part, on the *dicta* in *Ivanhoe* and *Arizona,* and even conceded that the *dicta* was inapplicable in this case. U. S. Brief, App. 43a-

44a. Thus, the United States again seeks to sustain the lower decisions on grounds different from those on which the lower decisions were based.

CONCLUSION

For the foregoing reasons, it is respectfully urged that our petition be granted.

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